SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 203

MRS. IDA ROSSER BARBER,

Petitioner,

vs.

LEGH R. POWELL, JR., AND H. W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

(a) *Barber* v. *Powell, et als., Receivers,* rendered by His Honor, Johnson J. Hayes, United States District Judge (not yet reported), filed November 24th, 1942, denying petitioner's motion to remand; and as printed in record, at page 2; and appears in Appendix to Brief in Circuit Court of Appeals.

(b) *Barber* v. *Powell, Receivers,* rendered by United States Circuit Court of Appeals for the Fourth Circuit

May 8th, 1943, through Justice A. M. Dobie (not yet reported) affirming the District Court; appears in printed record, page 7.

(c) *Barber* v. *Powell, et als.*, 222 N. C. 133. This opinion is not herein listed because petitioner may mistakenly think this is an appeal from the Supreme Court of North Carolina, for petitioner understands it is not, and that the judgment of the North Carolina Supreme Court is of no legal force on this petition (*Kloeb* v. *Armour*, 311 U. S. 199). It is here listed as a matter of convenience, and because the opinions in both the District Court and the Circuit Court of Appeals below for all practical purposes rested their rulings on an affirmance of it, or adopting and approval of its reasoning, but each upon differing grounds; and because the opinion of the State Court dealing with this same identical matter will be given great weight and consideration because of the learning and high standing of the Court and of the distinguished Chief Justice who wrote it.

II.

Statutory Provisions and Authorities Sustaining Jurisdiction.

Section 240-(a) of the Judicial Code, 28 U. S. C. A. 347-(a), sustains jurisdiction of this Court; as does case of *Gay* v. *Ruff*, 292 U. S. 25, and cases cited pages 28 to 31, inclusive, and *Kloeb* v. *Armour*, 311 U. S. 199.

III.

Statutes and Regulations Involved.

Judicial Code Sec. 66; 28 U. S. C. A. Sec. 125 (Mar. 3, 1887, c. 373; Sec. 3, 24 Stat. 554; Aug. 13, 1888, c. 866, Sec. 3, 25 Stat. 436; March 3, 1911, ch. 231, Sec. 66, 36 Stat. 1104);

and cognate portions of the removal Statute, Judicial Code 28 U. S. C. A. 41-(1), 71 and 80; and Judicial Code 65, 28 U. S. C. A. 124.

IV.

Statement of the Case.

All of the facts of the case are fully stated in the accompanying and annexed petition for Writ of Certiorari at pages 1-4 as "Summary Statement of Matters Involved"; and are referred to, but not repeated here. Any necessary elaboration will be made in the argument which follows.

V.

Specification of Errors.

1 to 7—These are fully set out under the heading: "Reasons Set Out for Allowance of the Writ", pages 4-9.

VI.

Summary of the Argument.

A. The questions to be passed on deal with matters of weight and substance as to important Federal law fixing and modifying the jurisdiction of United States District Courts in removal cases, and matters of great moment to the general public and numerous litigants, and the legal profession at large; and the effect of 28 U. S. C. A. 125 on the prior existing rights of removal by Federal Receivers, which should be definitely fixed and decided by the United States Supreme Court.

B. The District Judge and the Circuit Court of Appeals both should have, but neither did, independently interpret or construe the new Section 3 of the Removal Acts passed

in 1887 (now 28 U. S. C. A. 125) (and it was held in both Courts below and stated not to have received any binding construction by this Court since its enactment) and construe same in its connection with the other new portions (28 U. S. C. A. 124) and the older portions as amended and reenacted, of the Removal Act (28 U. S. C. A. 41-(1) and 71); by applying and giving effect to the accepted rules and canons of interpretation and construction; and by indulging the applicable presumption that until clearly shown otherwise the District Court was without jurisdiction on such removal; and the Courts below should have declared the result as reached by such method of independent interpretation; and should have also applied to removals for diversity of citizenship the portion of the judgment of the District Court (affirmed by Circuit Court of Appeals), which holds that 28 U. S. C. A. 125 properly interpreted and applied does prevent removals by Federal receivers from State Courts of cases arising under the Constitution and Laws of the United States, and as these provisions are *in pari materia,* each Court below should have held that if properly applied, it likewise prevented removal from State Courts for diversity of citizenship, by Federal receivers, as the application of the Statute was identical in both instances; and the Court below having correctly declared the law as to one right of removal, should have correctly and not incorrectly applied it as to the other.

C. The District Court and the Circuit Court of Appeals both failed to observe and give proper weight to *Gableman* v. *Peoria, etc. Ry.,* 179 U. S. 135, and other decided cases by the United States Supreme Court declaring the general purpose of Sec. 3, Act 1887 (28 U. S. C. A. 125); and failed to logically apply and carry out the portion of their own decision that this section did deny to Federal receivers the right of removal in cases arising under the Constitution and laws of the United States, and incorrectly failed to hold it

denied right of removal to Federal receivers on the ground of a diversity of citizenship; its application to both causes of removal being identical.

D. The acceptance by Congress for more than forty-two years of the general interpretation placed by this Court on the general purposes of Section 3, Acts 1887 (now 28 U. S. C. A. 125), and the declaration by this Court that its general purpose and intention as set out in *Gableman* v. *Peoria, etc. Ry.*, 179 U. S. 335, 339, was to give to the citizen the unrestricted right to bring and litigate his cause in his local Court and not in any other forum or according to any other course of justice, and that the object of the section is manifest and would be defeated if the Receiver could remove the case at his volition, and that such a right of removal would be inconsistent with the general policy of the act, makes such a controlling interpretation of the general purpose and intent of the act, which should have been observed and applied by the Courts below.

E. The District Court and the Circuit Court of Appeals both based their decisions on cases not controlling, or not applicable and not in point; and also base the same on dicta in inapplicable cases dealing with rights of Federal receivers as Federal officers, and the Circuit Court gave to a mere postulate in a non-appellate case actually dealing only with whether Federal Receivers are Federal officers which is contained in *Matarazzo* v. *Hustis*, 256 Fed. 882, preference over applicable decisions of controlling weight of the Supreme Court of the United States.

F. The Writ should be granted and the supervisory powers of this Court exercised; and the results in the Courts below reversed with directions; and because of the importance of the matters of jurisdiction involved, the Courts below having apparently overlooked or wrongly construed elementary canons of interpretations and presumptions in her favor, and the necessity thus created for extended discus-

sion of first principles, requiring analysis of very numerou citations, due indulgence should be allowed petitioner as to the otherwise unnecessary length of the supporting brief

Argument.

A—*The Questions to be Passed Deal With Matters of Weight and Substance as to Important Federal Law Fixing and Modifying the Jurisdiction of United States District Courts in Removal Cases, and Matters of Great Moment to the General Public and Numerous Litigants, and the Legal Profession at Large; and the Effect of 28 U. S. C. A. 125 on the Prior Existing Rights of Removal by Federal Receivers Which Should Be Definitely Fixed and Decided by the United States Supreme Court.*

The question presented by this petition for Writ of Certiorari deals with matters of gravity and importance, as to the meaning and effect of substantive Federal law gravely affecting the rights of the public at large, a large number of litigants, a numerous legal profession; and the jurisdiction of Federal District Courts as to removals by Federal Receivers on grounds of diversity of citizenship. Justifying the attention of this Court and the granting of the Writ, for all of these various reasons, the several grounds set out in the petition are amply sustained by the text in 36 C. J. S. Sec. 204, (b)-2, pp. 109 and 110, notes 4 to 10 inclusive and all cases there cited, including *Postal S. S. Corp.* v. *The El Iselo,* 308 U. S. 378; *Camp* v. *Gress,* 250 U. S. 308; *Sprague* v. *Ticonic Natl. Bank,* 307 U. S. 161; *Kingman & Co.* v. *Western Mfg. Co.,* 170 U. S. 675; *U. S.* v. *Reynolds,* 250 U. S. 104; *Detroit Steel Corp.* v. *Sistersville Brewing Co.,* 235 U. S. 712; *Lane* v. *Wilson,* 307 U. S. 268; *Niles-Bennett Prod. Co.* v. *Iron Moulders Union,* 254 U. S. 77; *Fed. Trade Com.* v. *Raladam Co.,* 316 U. S. 149; *Carpenter* v. *Winn,* 221 U. S. 533; *Williams* v. *Jax. Ter. Co.,* 315 U. S. 386; *U. S.* v. *Rizzo,*

297 U. S. 530; *LeTulle* v. *Schofield,* 308 U. S. 415; *Freeman* v. *Bee Machine Co.* (No. 707, decided June 1, 1943, p. 1074, Co-op Adv. Opinions); (and the question presented by the case at bar is equally as important as in *Erie R. R.* v. *Tompkins,* 304 U. S. 64, and has not been longer in abeyance); to call attention to only a few of the more recent of them in point, selected for the diversity of reasons assigned for granting Writ, but each having a direct application to the reasons assigned in this petition, and in each of which the writ was granted for reasons no less compelling and no less important than is presented by the petition at bar.

B—Neither the District Court nor the Circuit Court of Appeals Below Independently Construed or Correctly Applied 28 U. S. C. A. 125; and Both Courts Held it Had Never Been Definitely Construed or Applied by this Court, with Respect to Diversity of Citizenship Cases, and the District Court and Circuit Court of Appeals Each Failed to Apply to the Right of Removal for Diversity of Citizenship by Federal Receivers an Identical Provision which the District Court Held Would Have by Application of Supreme Court Prevented Removal by a Federal Receiver on Another Ground.

C—The District Court and Circuit Court of Appeals Below Both Failed to Give Proper Weight and Application to the Adjudications of this Court Denying to Receivers the Right to Remove Tort Cases from State Courts on Grounds of Diversity of Citizenship.

All questions presented are so closely related, everything said as to one, and every authority cited, should be considered in its relation to each. At every stage and in every Court, including this, the presumption continues that the District Court was without jurisdiction. 28 U. S. C. A. 80; *Shamrock Oil & Gas Co.* v. *Sheets,* 313 U. S. 100; *Kloeb* v.

Armour, 311 U. S. 199; *Wilson* v. *Republic I. & S. Co.,* 257 U. S. 92, and would seem to prevail in preference to the presumption against error by the lower Courts.

Circuit Court jurisdiction as to removals prior to 1911 is now District Court jurisdiction. 28 U. S. C. A. 430, 430-(a).

Whether the amendment and re-enactment with the new Secs. 2 and 3 (28 U. S. C. A. 124, 125) be considered in one way or another, makes no practical difference,—the new sections constitute a limitation or exception on the prior general right of non-resident receivers to remove, as a new, or special right granted to the citizen to bring and try his case in the local Courts; and these applied as exceptions to all general rights of removal under the amended legislation.

The petitioner has been as concise as possible, but the failure of the Courts below to apply elemental principles require a recurrence to them, and makes imperative an analysis of a greater length than would otherwise be required.

The District Judge and the Circuit Court of Appeals both should have, but neither did, independently interpret or construe the new Section 3 of the Removal Acts passed in 1887 (now 28 U. S. C. A. 125)—both Courts below stated it not to have received any binding construction by this Court since its enactment—and did not construe same in its connection with the other new portions (28 U. S. C. A. 125) and the older portions as amended and reenacted, of the Removal Act (28 U. S. C. A. 41-(1) and 71; by applying and giving effect to the accepted rules and canons of interpretation and construction; and by indulging the applicable presumption that until clearly shown otherwise the District Court was without jurisdiction on such removal; and the Courts below should have declared the result as reached by such method of independent interpretation; and should have also applied to removals for diversity of citizenship the portion of the judgment of the District Court (affirmed by Circuit Court of Appeals), which holds that 28 U. S. C. A.

125 properly interpreted and applied does prevent removals by Federal receivers from State Courts of cases arising under the Constitution and laws of the United States; and as these provisions are *in pari materia,* each Court below should have held that if properly applied, it likewise prevented a removal from State Courts for diversity of citizenship, by Federal receivers as the application of the Statute was identical in both instances; and the Courts below having correctly declared the law as to one right of removal, should have correctly and not incorrectly applied it as to the other.

Decisions are always, as stated by the District Court, to be understood and applied with reference to the facts involved. But the District Judge erred and failed to correctly apply it when he held *Gableman* v. *Peoria, etc. Ry.,* 179 U. S. 135 would be binding as a precedent denying to Federal receivers the right to removal had this case arisen under the Constitution and laws of the United States, but was not in this case, because this was based on a diversity of citizenship, and because that arose in a case involving a question whether it did, but which did not so arise, under the Constitution and laws of the United States; and when he held that there could be any distinction of fact or principle, preventing its equal operation as such a denial to Federal receivers of a right of removal for diversity of citizenship, from the other. There is no distinguishing fact or principle creating any difference between these two rights of removal, and it cannot be contended there is any distinction in the Statute itself.

Such limitation by the Courts below to only a single one of the rights, or a proper lack of application of it to all the rights involved, could have only been proper had there existed some special circumstances essentially different in the case decided from that to which it is sought to be applied, or had there existed some statutory reason, or one

set out in the Gableman opinion. Its applicability is determined by the presence or absence in both instances of the governing principles, and not by the presence or absence of non-essential facts. *Brooks* v. *Marbury*, 11 Wheat (24 U. S.) 78, 91-2; 25 R. C. L. "Statutes", Sec. 24, p. 778; 59 C. J. "Statutes", Sec. 647, p. 1096.

The right of removal for a diversity of citizenship being *in pari materia*, and Sec. 3 (28 U. S. C. A. 123) applying to both exactly in the same way, without distinction of any kind, the District Judge should have also held, and the Circuit Court of Appeals should have also decided, that such application and construction absolutely denied to Federal receivers a right of removal for diversity of citizenship. *Geo. Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373; *Helvering* v. *New York Trust Co.*, 292 U. S. 455; *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356; *Hall* v. *Russell*, 101 U. S. 503.

There is no "fundamental philosophy" of the removal statutes, nor is there any such thing as a general right of removal, as the Circuit Court of Appeals below seemed to assume might exist. As the late Mr. Justice Brodgen, of the North Carolina Supreme Court, frequently stated in his opinions "the Statute giveth and the Statute taketh away." The sole right of removal, with every reasonable intendment against the jurisdiction of the District Court below, is that as embraced in the Removal Act, with amendments as Act March 3, 1887, and subsequent amendments, Ch. 373 (now 28 U. S. C. A. Secs. 41-(1) 71, 80, 124 and 125), as applied to removals, is the sole law on the subject. *Shamrock Oil & Gas Co.* v. *Sheets*, 313 U. S. 100; *Great Northern R. R. Co.* v. *Alexander*, 246 U. S. 276; *Hanrick* v. *Hanrick*, 153 U. S. 192.

The Circuit Court of Appeals quotes with approval Moore's Fed. Prac. Vol. 3, p. 3359: "The sole purpose of the Act is to make Federal receivers amenable to suit with-

out permission of the appointing Court." This is contrary to United Supreme Court decisions.

The conference report (Congressional Record 49th Congress, 2nd Session 1887, p. 2727) at time of the enactment of 28 U. S. C. A. 124 and 125, was as follows:

> "The conferees on the part of the House submit the following statement to accompany House Bill 2441:
>
> "The amendments of the Senate other than those merely verbal, promote the objects of the Bill, which is to reduce the jurisdiction of the Courts of the United States, and to *regulate the removal of causes from the State to Federal Courts. The effect of the amendments is to reduce the jurisdiction of the Circuit Courts of United States;* (Italics supplied by petitioner); and the managers on the part of the House recommended that the House recede from its disagreement and agree to the Senate amendment.
>
> "D. B. Culberson, J. Randolph Tucker, A. X. Parker."

Note that this Report used the term "*amendments.*"

The House receded from its disagreement and agreed to these Senate Amendments and Secs. 2 and 3 (now 28 U. S. C. A. 125) became a newer portion of the law. The Senate amendments were 28 U. S. C. A. 124 and 125.

No other reason based on common sense could be assigned for making it a part of this legislation even without reference to the conference report than to effect the formerly existent right of Federal receivers to remove from State Courts. The opinions of the District and Circuit Court of Appeals each says it had no such effect; the Circuit Court says that it did not affect any existent right of removal and was intended to have no effect whatever on *removals.* Petitioner submits the jurisdiction would not be "reduced", or even intelligently attempted to be reduced by giving to the citizen only the right to "bring" his suit

in the local Court, if such right was so transitory and meaningless it could be immediately taken from him at the Receiver's volition.

This House conference report states a purpose in full harmony with the adjudged purpose of this legislation (*Helvering* v. *Twin Bell Oil Synd.*, 293 U. S. 312) as subsequently declared by this Court to "reduce", "contract", "restrict" and "control" the jurisdiction of Federal Courts and to "restrain the volume of litigation pouring into the Federal Courts."

Gay v. *Ruff*, 292 U. S. 25, 31, 35;
Gableman v. *Peoria, etc. Ry.*, 179 U. S. 335, 337;
McDonnell v. *Jordan*, 178 U. S. 229, 238;
Tennessee v. *Union & Planters Bank*, 152 U. S. 454, 462;
Fiske v. *Henarie*, 142 U. S. 459, 467;
In Re: Pennsylvania Co., 137 U. S. 451, 454;
Smith v. *Lyon*, 133 U. S. 315, 319, 320.

That such is its purpose is no longer open to construction or discussion. Congress has not only so said, but this Court has so adjudged. In *Gableman* v. *Peoria, etc. Ry.*, 179 U. S. 335, 337, the late Chief Justice Fuller said for this Court:

> "The general policy of the act of March 3, 1887, corrected by the Act of August 13, 1888; 24 Stat. c. 373, p. 552; 25 Stat. c. 866, p. 433, as is apparent on its face, and as has been repeatedy recognized by this Court, was to contract the jurisdiction of the Circuit Courts, Tennessee v. Union & Planters' Bank, 152 U. S. 454, 462, and cases cited * * *."
>
> "Section 3 of the Acts of 1887 and 1888 reads:
>
> " 'That every Receiver or manager of any property appointed by any Court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the Court in which such

Receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the Court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

"This act abrogated the rule that a receiver could not be sued without leave of the Court appointing him, and gave the citizen the unconditional right to bring his action in the local Courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal Court."

"The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the Act."

The proper construction or interpretation should this Court enter on such, or review the *Gableman* case as an independent matter, does not involve any consideration of the doctrine of "implied repeal", upon which the District Court opinion says petitioner's contentions would have to rest. The four canons meriting full and earnest consideration and decisive application are:

(a) The purpose and intent of legislation, whether gathered from Congression reports, or ascertained and declared by this Court, shall be carried into effect, and any interpretation or construction defeating such intent and purpose will be rejected;

(b) Precedence is given to new amendatory legislation which is special and particular, dealing with a par-

ticular class or subject, over older general legislation dealing with the entire subject;

(c) A construction will be rejected which produces or is capable of producing an arbitrary or ridiculous result if a possible construction or interpretation will produce a consistent and workable, sensible and understandable result;

(d) 28 U. S. C. A. 125 as a remedial statute for the protection of the rights of the citizen should be liberally construed and interpreted and so as to promote the remedy; but as fixing and defining the solely statutory rights granted to Federal receivers it should be strictly construed against them to determine whether such asserted right falls within its scope.

While ordinarily placement at time of enactment should be given due weight and consideration in determining questions of construction and interpretation should resort to the same be necessary, but thereafter any subsequent codification or re-codification, and the separation and change of placement or position of the various paragraphs is without meaning or significance in arriving at the true meaning, either in depriving it of its original bearing and weight, or in conferring on it a new one. 28 U. S. C. A. 433; *Sowell* v. *Federal Reserve Bank*, 268 U. S. 449; *Warner* v. *Goltra*, 293 U. S. 155; *Hales* v. *Iowa, etc. Bd. of Review*, 302 U. S. 95.

It was especially so enacted with respect to the Judicial Code (28 U. S. C. A. 433) of which the removal statute was made a part. 59 C. J. 596 (c); *United States* v. *Limehouse*, 285 U. S. 424, 426.

The precise question of statutory construction here involved does not, in petitioner's opinion, arise out of implied repeal, or irreconcilable conflict, further than the always possible conflict, in its narrowest sense, which arises from general and special provisions in the same statute. In such

cases of general and special provisions in the same statute, the correct rule which should have been applied by the District Judge and the Circuit Court of Appeals, but was not, is that laid down by the United States Supreme Court (quoting from *Crane* v. *Reeder,* 22 Mich. 322, 334) in the case of *Rodgers* v. *United States,* 185 U. S. 83, 89, as follows:

> "Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provisions, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict."

Also see *U. S.* v. *McClure,* 305 U. S. 472.

Should the proper approach have been that the amendment and re-enactment of old Secs. 1 and 2 (now U. S. C. A. 41(1) and 71), with the simultaneous addition of new Nos. 2 and 3 (now U. S. C. A. 124 and 125), as new legislation made both contemporaneous and either *in pari materia,* or whether new legislation dealing with the same subject, both dating from the enactment in 1887-8, the same result would be reached. The new Secs. 2 and 3 were special legislation on the same subject, and dealing with a special and restricted right arising under, or phase of the same subject, and therefore modified and restricted the preceding old Sections 1 and 2, which constituted general legislation, or provisions dealing with the subject generally, and the later sections must be considered as creating a special right, to be treated as an exception. Sutherland on Statutory Construction (1891 Ed.) Secs. 148, 153, 154, 155, 156, and 159.

Black on Interpretation of Laws, Sec. 103, p. 325, and cases cited, pp. 328-9.
Rodgers v. *United States, supra.*
Ginsburg v. *Poplin,* 285 U. S. 204.
Missouri v. *Ross,* 299 U. S. 72.

Innumerable citations to like effect could be given did space permit.

As to rights of petitioner under this Act she is entitled to a liberal construction in her favor so as to protect and promote them; but respondents attempted assertion of a statutory right should be strictly construed to determine whether it falls within its scope and meaning. Sutherland on Stat. Con. (1931 Ed.) Secs. 398, 399, 405, 409-12.

Petitioner respectfully suggests that a due consideration by the District Judge and by the Circuit Court of Appeals, of the same rules equally applicable to the case at bar, and held decisive in the foregoing and the following cases, would have produced a different result from that reached. The Limehouse case (Fourth Circuit) arose from a failure of the District and Circuit Courts to give due effect to the modifying effect of an amendatory new provision in an act and creating a new and additional crime; and the *McClure* case (in this respect exactly on all-fours with this case) arose from a failure to apply and give effect to the newer and special provisions contained in an amended and re-enacted statute modifying former rights in regard to War Risk Insurance.

U. S. v. *Limehouse,* 285 U. S. 424, 426;
U. S. v. *McClure,* 305 U. S. 472, 477-8;
British Am. Oil P. Co. v. *Bd. Equalization,* 299 U. S. 159.

Should the proper approach to Section 3, Acts 1887-8 (66 Judicial Code 28 U. S. C. A., Sec. 125) and Sec. 2 (65 Judicial Code, 28 U. S. C. A. 124) have been that such was new

or amendatory legislation, and the original old Secs. 1 and 2 was old legislation, these sections, treated as such separate legislation, or enactments, would be in *pari materia* with the other sections, the newer with the older. The new would be amendatory or special legislation dealing with a special and restricted phase of the same subject, and to such extent would supersede or take precedence over the older and general legislation.

Callahan v. *U. S.*, 285 U. S. 515, 518;
Johnson v. *So. Pac. R. R.*, 196 U. S. 1;
Walla Walla v. *Walla Walla Water Co.*, 172 U. S. 1, 22, 59 C. J. Sec. 570, p. 958; 571, p. 961; 573, p. 964; Sec. 596, p. 999; Sec. 597, p. 1001.
Rhodes v. *Iowa*, 170 U. S. 412;
Am. Tob. Co. v. *Werckmeister*, 207 U. S. 375;
Puerto Rico v. *Shell Co.*, 302 U. S. 253, 258;
Miller v. *Milwaukee*, 272 U. S. 713;
Marin v. *Aughdal*, 247 U. S. 142.

This rule requires that a special enactment or provisions or dealing with a particular class or subject shall take precedence over the general enactment, and is to be construed as an exception to the general, and is equally applicable were the special originated at the same time or later than the general.

This is stated and applied in *Townsend* v. *Little*, 109 U. S. 504, 512, where it was said:

> "According to the well settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring deeds generally to be executed with two witnesses. * * * Bishop on the Written Laws, 112-a.

> The deed of the mayor to Townsend having been executed in conformity with the special act was therefore valid and effectual to convey the legal title."

Also see, among the literally hundreds of other citations to same effect, which might be called to Court's attention:

Richmond Screw & Anchor Co. v. *U. S.*, 275 U. S. 331, 346;

Ex Parte Crow Dog, 109 U. S. 556, 570-72;

Mutual Life Ins. Co. v. *Hill*, 193 U. S. 551;

Washington v. *Miller*, 235 U. S. 422, 428;

Atkins v. *Fibre Disintegrating Co.*, (18 Wall) 85 U. S. 272;

U. S. v. *Chase*, 135 U. S. 255;

McKee v. *U. S.*, 164 U. S. 287;

Carroll v. *Greenwich Ins. Co.*, 199 U. S. 401;

Citations and Case Notes, 18 Rose's Notes, U. S. Sup. Ct. Reports, p. 1060, to *Rodgers* v. *U. S.*, 185 U. S. 83;

Citations and Case Notes, 12 Rose's Notes, U. S. Sup. Ct. Reports, p. 222 to *Townsend* v. *Little*, 109 U. S. 504, 512;

25 R. C. L. Statutes, Sec. 250, note 5.

The following cases are also a few of the many which might be cited, as to the proper application of the rules of construction involved: *U. S.* v. *Kirby*, 74 U. S. 482; *Church of Holy Trinity* v. *U. S.*, 143 U. S. 457; *Bird* v. *U. S.*, 187 U. S. 118; *Employers' Reinsurance Corp.* v. *Bryant*, 299 U. S. 374; *U. S.* v. *Raynor*, 302 U. S. 540; *U. S.* v. *Powers*, 307 U. S. 214; *Sunshine Anthracite Co.* v. *Atkins*, 310 U. S. 381; *U. S.* v. *American Trucking Assoc.*, 310 U. S. 534; and the following texts: 25 R. C. L. Statutes, Sec. 223, notes 14 and 15 and cases cited; Sec. 246, notes 8 to 17; Sec. 248 and 249, Sec. 250; Sec. 253; 59 C. J. Statutes, Secs. 562-734; Black on Interpretation of Laws (2d Ed.) Ch. VIII; Secs. 99 to 107; Sutherland on Statutory Construction, Sec. 160

(pp. 214-15); Secs. 216-17, pp. 286-7; Sec. 148, p. 200, Secs. 153, 154, 155 and 156, pp. 206-9; all hold the purpose and intent of the law-making body as to special provisions as limiting general however such intent is arrived at, is controlling.

As to what would be the proper consideration to be given to Sec. 65, Judicial Code, 28 U. S. C. A. 124, of the requirement that receivers shall operate according to State law, as bearing on the general policy and correct interpretation of act as contended by petitioner, see: *U. S.* v. *Nixon,* 235 U. S. 231; *Northern Pac. R. R.* v. *Washington,* 222 U. S. 370; *So. Ry.* v. *King,* 217 U. S. 532; *S. A. L. Ry,* v. *Seegers,* 207 U. S. 77; *S. A. L. Ry.* v. *Blackwell,* 143 Ga. 245; Ann. Cases 1917-A, p. 967.

Tested according to the foregoing principles, and canons of construction and interpretation, and applying the declared intention of Congress in adopting these enactments, and the adjudicated scope, purpose and intention of the general policy of the act as declared by this Court, would demand a holding that, if this be a matter of first impression, the supervisory powers of this Court should be exercised, to bring the decision of the lower Courts into harmony with such declared and adjudged purpose and intent.

Congress will not be presumed to have intended to do so vain and foolish a thing of no practical value, or of such small effect, as enacting the removal statute with Section 3 (now 66 Judicial Code 28 U. S. C. A., Sec. 125) embodied therein; and which expressed on its face the intention to confer this substantial right of local trial on all litigants, if it had really meant it should apply only to residents of the same State as Federal receivers, who stood in no need of it.

Decisions of determinative scope and authority by the Supreme Court of the United States declaring its general

policy and purposes have construed and interpreted this Act and its general purpose so that the same must be applied, even were this a matter of first impression, as denying to Federal receivers the right to remove cases of the class of that at bar to Federal Courts at their volition, on the ground that the object of this Section is manifest to confer such unconditional right of trial in the local Courts, without plaintiffs being compelled to litigate at a distance, or in any other forum, or according to any other course of justice; and that to permit the exercise of such volition would be destructive of and inconsistent with the general policy of this Act, and would destroy its purpose, and that the intention of Congress to permit this to be done could not reasonably be imputed to it. *Gableman* v. *Peoria, etc. Ry.* 179 U. S. 335, 339; *Eddy* v. *Lafayette,* 163 U. S. 456; *Texas, etc. Ry. Co.* v. *Johnson,* 151 U. S. 81, 102-3; *Erb* v. *Morasch,* 177 U. S. 584, 585.

If the plaintiff's rights be only such as are declared by the opinions of the District and Circuit Courts, and entirely or partially subservient to those of the receiver as to removal, such purported grant was an utter futility, for it is entirely possible for a Judge in appointing a receiver (or in this case by removing these respondents and appointing a Receiver) from Vermont or Oregon or from some State where this North Carolina Corporation does not do business, and for practical purposes to thus make every case a removable case, and destroy such right as a practical matter.

Conversely, if the superior right was intended by Congress to be with the receiver, the appointing Judge might nullify it at pleasure, by originally appointing or, in this case, might remove these respondents and appoint a receiver who was a resident and citizen of the District of Columbia (*Hooe* v. *Jamieson,* 166 U. S. 395, 397-8) or a resident and citizen of a territory (*Cameron* v. *Hodges,* 127

U. S. 322)—and there were quite a number of territories in 1887-8. No case would then be removable on grounds of diversity of citizenship, as the defendants would not be either an alien or a citizen and resident of some other "State" than plaintiff.

Congress did not intend, and should not be held to have intended to bring about any such foolish, unreasonable and arbitrary result as to make plaintiff's right a matter of either favor or discretion, either by a receiver or a judge; or to produce any such absurd or incongruous result. *U. S.* v. *American Trucking Assoc.,* 310 U. S. 534, 542-44, notes 16-25; *Sunshine Anthracite Co.* v. *Atkins,* 310 U. S. 381, 392; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.,* 305 U. S. 315.

Congress thought it had passed an act so all embracing and all inclusive that in order to make certain it had reserved and preserved to the appointing Court of the receiver even the right to supervise and protect the corpus of the estate committed to his charge, it, in Sec. 3 (28 U. S. C. A. 125) thought it necessary to insert the following:

> "* * * Such suit (that authorized in the State Court) shall be subject to the general equity jurisdiction of the Court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

The consideration of the foregoing applicable principles demonstrate an entire failure by the Courts below to apply them.

The District Judge below, in his opinion which is affirmed by the Circuit Court of Appeals, declined to apply to removals for a diversity of citizenship, the conceded and admitted general construction made by this Court of Sec. 3 removal acts in the opinion in the *Gableman* case, and which it is there conceded would have denied a right of

removal on one of the grounds subject to its limitation, His Honor saying:

> "There is no question but that it is an authority if the removal is based on the ground that the case is one arising under the Constitution and laws of the United States."

There is nothing in the Statute, as a whole or in Sec. 3 (U. S. C. A. 125) or in particular, making any distinction as to the application of the conceded limitation created on the right of removal by *Federal* receivers, as between these two rights of removal. There being no possible difference, and the limitation created by Sec. 3 applies to the *Federal receivers* in all applicable cases, and because of the *Federal* appointment, and not to or because of the nature of the *cause of removal;* and a decision binding as to one right of removal was binding as to both.

With due deference to the Courts below petitioner insists that the refusal to equally apply the conceded limitation as settled by a conceded general construction which the District Court said was made by this Court as to prevent the exercise of a co-ordinate right of *Federal* receivers to remove, to an indistinguishable right from a right to remove on the ground of diversity of citizenship, because the Supreme Court case in which the general construction was made had held the case presented did not involve a right of removal assertable as arising under the Constitution and laws of the United States, which was another right of removal as to which the actual legal limitation was identical, and as to which the declaration of such general purpose was no more strictly applicable, was just as illogical and unjustifiable, either in logic or law, as would have been a refusal of this Court to have applied the general construction of the general purposes of the Coupler Safety Act, as made in *R. R.* v. *Taylor,* 210 U. S. 281, 294-6, and affirmed in

Chicago, etc. Ry. v. *U. S.*, 220 U. S. 559, 571, 575, in some subsequent case to it, had this Court assigned as a ground for its non-application, that the Taylor opinion showed (if it did) the *Taylor* case was dealing with the rights of a white citizen, and the rights involved in the subsequent case were those of a Negro, or Indian or a Chinaman, and that therefore the decision in the *Taylor* case as to the general construction and application of the Safety Coupler Act was not a decision of what would be the rights of such Negro, Indian or Chinaman.

There seems to be no escape from the conclusion that the effect of such construction of the statute was general in its nature and application, and applies equally to the two rights of removal dealt with in the statute; and that the lower Courts attempted limitation of the effect of the decision of this Court of the general purpose of it, and which by its tenor extended such holding to all rights of removal subject to it, was not justified. The judicial construction as to its general purpose by this Court could not and should not be limited or confined to the particular kind of removal then being dealt with, unless the statutory limitation itself in terms, or by its intended meaning to be arrived at by construction, or the judicial determination of its general purpose and scope by the set terms contained in the opinion itself, confined its application only to such particular facts or cause for removal as were involved in that case, and unless it in some way clearly excluded the other, or there existed a different state of facts distinguishing it in fact or principle from the right of removal for a diversity of citizenship.

Another applicable principle, not discussed in the cited cases herein, seems to petitioner, under the terms of the Act, to deny to Federal receivers the asserted right of removal:

A specific order authorizing suit against a receiver in some particular court by the appointing court of a receiver, when such is required by Statute, or is a required procedure before suit can be brought; or leave by general order by the appointing court or when contained in the order appointing a receiver, and which gives leave to bring suit in any court of competent jurisdiction, is effectual for all purposes to prevent a removal from such court. 53 C. J. Receivers Sec. 557-8, p. 343. 45 Am. Jur. "Receivers", p. 364, last par. Sec. 456. No reason is perceived why a general statutory leave enacted by the same law-making power which created the court and fixed its jurisdiction, as was done by Sec. 3 (28 U. S. C. A. 125) and which clothes any court of requisite jurisdiction with power and authority to hear and determine these cases, is not equivalent to, and just as efficacious, and does not as a specific leave, have the same precise effect in preventing a removal, as would a formal order of the court which had been created by the same law-making power.

For all the foregoing reasons as set out in B and C above this court should, in the exercise of its supervisory powers grant the writ; and on a hearing on the merits, should reverse the Circuit Court of Appeals, and direct it to reverse the District Court, and to direct the remand of this case to the State court from whence it came.

* * * * * * *

D—The Acceptance by Congress for More than Forty-two Years of the General Interpretation Placed by this Court on the General Purpose of Sec. 3, Acts 1887 (now 28 U. S. C. A. 125) and the Declaration by this Court that its General Purpose and Intention as Set Out in Gableman v. *Peoria, etc., Ry., 179 U. S. 235, 339, Was to Give to the Citizen the Unrestricted Right to Bring and Litigate His Cause in His Local Court and Not in Any Other Forum or According to*

Any Other Course of Justice, and that the Object of the Section is Manifest and Would Be Defeated if the Receiver Could Remove the Case at His Volition, and that Such a Right of Removal Would Be Inconsistent with the General Policy of the Act, Makes such a Controlling Interpretation of the General Purpose and Intent of the Act, which Should Have Been Observed and Applied by the Courts Below.

What is said in the *Gableman* case, viewing it as a precedent as to the general purpose and intent, and construction of this Section, had no peculiar bearing on any particular situation presented by actions to remove which might arise under the Constitution and laws of the United States. The statement of the general purpose was just as applicable to removals for diversity of citizenship as to whether Federal receivers having been appointed pursuant to Federal law made suits against them, for torts by their servants, actions arising under the Constitution and laws of the United States, or any of the other questions discussed. Conversely, had the question presented therein been one of removal for diversity, the general interpretation made would have applied to the various other grounds.

It was, as appears on its face, intended to be a construction of the entire general purpose and policy of the Act. By force of the language and purpose of the law itself the limitation applied to all classes of rights of removals when attempted to be exercised by a *Federal* receiver. The limitation was as to any right whatever of removal by this class of receivers, not to a single one of the different rights of removal. It was so accepted for more than forty-two years, with Congress acquiescing, and all others accepting it as applying to diversity of citizenship cases.

It will not be presumed that this Court, and each member of it in 1900, when the opinion in the *Gableman* case

was delivered, did not fully realize and understand the precise nature of the question certified by the Circuit Court, and that the answer to the question of the Circuit Court was explicit and categorical to the effect that the case presented was one that did not arise under the Constitution and laws of the United States, and was not removable because it was a case which did not so arise; and did not further fully realize that any further discussion and exposition and determination of the general or special or other purpose whatever of Section 3 was inapposite except as a judicial determination of its general meaning and application, in order to guide the Courts in future consideration of it. Nor should it be presumed that this Court and each of its then members did not fully realize and understand that there existed no difference in principle, or under the terms of the Statute between removals for a diversity of citizenship and removals of cases arising under the Constitution and laws of the United States, and did not know or realize that the construction as therein laid down by this Court was not confined to either class of removals, but was so written as to apply to both.

The Court, and the late Chief Justice Fuller, were not only masters of the law, but, as his opinions demonstrate, he was also a master of the precise use of language to express his exact shade of meaning.

The *Gableman* case (179 U. S. 335, decided in 1900) drew in question a general interpretation of Secs. 2 and 3, Acts Congress, March, 1887, and August, 1888, now U. S. C. A. 28, 124 and 125, and properly involved a general construction of the purpose of these Acts; and this decision is an authoritative and binding decision as to its general purpose and effect which has never been questioned by the Courts or Congress, or by any text-writers, as applied to *Federal* receivers—the only class dealt with in these two sections. This Court had the right to make

such general interpretation, when the Statute was before it in any aspect. See: 14 Am. Jur. "Courts"—Sec. 66—"Interpretation of Statutes," citing *U. S.* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 1st headnote and page 487; *Vail* v. *Arizona*, 207 U. S. 201, 203-5; *Ontario Land Co.* v. *Wifong*, 223 U. S. 543; *Chicago, etc.* v. *R. R.* v. *U. S.*, 220 U. S. 559 (pages 571 and 575) dealing with the effect of the former construction—contended to be a dictum—of the Safety Appliance Act, in R. R. v. Taylor, 210 U. S. 281).

The case of *Chicago, etc. R. R.* v. *U. S.*, 220 U. S. 559 (571-7) involved whether the decision of the question by a former general construction of the Safety Coupler Act (last question considered, 210 U. S. 294-5-6) though not absolutely required for a decision of *Taylor* case, was an authoritative and binding decision, or was merely *obiter*. It was held all material questions were open for decision, when the construction of any portion or phase of a statute was involved. *Greene* v. *Louisville, etc. Co.*, 244 U. S. 499, 519-21; *Hopkins* v. *Tel. Co.*, 275 U. S. 393 (Headnote 2, and pp. 398-9); *Steinmetz* v. *Allen*, 192 U. S. 543, 560; *Smiley* v. *Kansas*, 196 U. S. 447, 456.

When a court clothed with jurisdiction actually construes an Act, and any part of the Act is involved in the decision, no part of the decision is a dictum. *Ontario Land Co.* v. *Wifong*, 223 U. S. 543; *Culpepper* v. *Ochiltree*, 256 U. S. 483; *Jones* v. *Habersham*, 107 U. S. 174; *Florida C. R. Co.* v. *Schulte*, 103 U. S. 118; Ann. Cases, 1912-C, p. 1248; 14 Am. Jur. "Courts", Sec. 84, p. 298.

Plaintiff says that notwithstanding the narrowness of the ground upon which the *Gableman* case, *supra*, might have been presented what was said applied to all rights and limitations created, and the fact is the opinion was intended to be and was a general interpretation of the section, an-

nounced in order to clarify its meaning and as a guide to the lower courts in future cases. *U. S.* v. *Poller,* 43 Fed. (2d) 911, 74 A. L. R. 1382. If more was said than necessary to a decision in that case, "It was said on full consideration and with the view of announcing the opinion of the court on that subject". *Burlington, etc. R. R. Co.* v. *Dunn,* 122 U. S. 513. Moreover, this section 3 and section 2 applies only to Federal receivers, and the decisions in respect of other receivers, representatives, executors, administrators, guardians, trustees, etc. are inapposite. The petitioner further contends that the language of the opinion is not only broad enough to cover a case like the present, but was so intended, and that as such it constitutes an authoritative expression on the subject. If a dictum, it was a judicial dictum. 21 C. J. S. "Courts", Sec. 190, (C), p. 316; 14 Am. Jur. 298. But it was not a dictum.

As is conceded in the three opinions dealing with the case before it reached this Court, diligence of the courts and of counsel have revealed only one reported opinion, that in *Brisenden* v. *Chamberlain,* 53 Fed. 307 (not an appellate opinion), which was rendered since the enactment of Sec. 3 in 1887 (now 28 U. S. C. A. 125) which even inferentially deals to the contrary with removals by a Federal receiver for diversity of citizenship. This is discussed further and its lack of force as a precedent pointed out in Sec. E, following.

The following text writers of standing and high reputation all accepted *Gableman* v. *Peoria, supra,* and other cases of like import, as construing the new Secs. 2 and 3 of the amended and re-enacted removal acts as denying to Federal receivers the right of removal:

45 Am. Jur. "Federal Receivers" Sec. 461-4, p. 366-8; Removal of Causes, Sec. 9-11, p. 813-14.
23 R .C. L., "Receivers", Secs. 135-6-7

53 C. J. "Receivers—Requirement of Leave to Sue—Statutory Modification of Rule"—p. 343, notes 94-95
53 C. J., "Receivers", Sec. 548 and Secs. 557-558 (note 21)
Rose's Notes Sup. Ct. Decisions, Vol. 18, pp. 671-3
Simpkins Fed. Prac. Secs. 1117, 123, 124, 136 and 344
Hughes Fed. Prac. (1931 Ed.), Vol. 2, Sec. 11267, and particularly note 62, and Sec. 1171
Hughes Fed. Prac. Vol. 4, Secs. 2283, 2284 and 2285, and note 89 to Sec. 2285; 2286
Montgomery's Manual Fed. Jur. and Prac. Secs. 172, 184, 174 and 287.

"Receivers," p. 561

To the same precise effect is Sec. (f), 10 Encyc. U. S. Sup. Court Reports where the Editor says, referring to 28 U. S. C. A. 125:—

> "(f)—CAUSE NOT REMOVABLE BY RECEIVER—The object of the section is manifest, and it is equally plain that that object would be open to defeat it if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the Act."

Simpkins Federal Procedure (3rd Ed.) Sec. 1117 and Hughes Federal Practice (Sec. 2325) correctly recognize the rights of Trustees, Administrators and other Receivers than Federal Receivers, (whose rights of removal in such respect as non-federal receivers are not questioned by petitioner) to remove where a diversity of citizenship exists between plaintiff and such defendants because of their personal residence, but neither contains anything contrary to the contentions here made as to Federal receivers, in the sections above cited. Such rights of other classes of representatives than *Federal* receivers are not involved on this petition.

Evidently as a practical matter, the editors of the Hughes

great work (1932 Ed.) did not consider such a right then existed in favor of Federal receivers for a diversity of citizenship. In neither of the two removal forms for the use of Federal receivers (Vol. 14, p. 769-80, Secs. 14079 and 14080) is such ground set up, though Section 14080 is erroneously so entitled. Both forms are exclusively based on the theory, now exploded by *Gay* v. *Ruff*, 292 U. S. 25, that Federal receivers are Federal officers.

* * * * * * *

E—The Circuit Court of Appeals Below Rested its Decision on and Cited with Approval Numerous Cases Not in Point; also a Mere Dicta and Postulate in Matarazzo v. *Hustis, 256 Fed. 882, a District Court Opinion Only Deciding that Federal Receivers Were Federal Officers, which Holding Is Contrary to Supreme Court Law and Has since Been Overruled by the United States Supreme Court.*

Petitioner most respectfully submits the opinion of the Circuit Court of Appeals below was most unhappy in its citations of authority to sustain its position, as well as by references to "the general principles and what might be called the fundamental philosophy of the Federal removal statutes", which Statute deals with rights which can only exist under a strict construction of the Statute. It also adopts and approves the opinion in *Barber* v. *Powell*, 222 N. C. 133, (as does the District Court opinion); in which it affirms the District Court.

Those cases cited on this question involving only the question of Federal receivers citizenship and removal, do not, with the possible exception of *Brisenden* v. *Chamberlain*, 53 Fed. 307 (CC 1892) and in *Davies* v. *Lathrop*, 12 Fed. 353 (CCA 1882), plaintiff further most respectfully suggests, even remotely involve an approach to the question now at bar. Those decided since the Gableman case deal

only and exclusively with the exploded doctrine (*Gay* v. *Ruff*, 292 U. S. 25) that Federal receivers were Federal officers. Such cases do not have any direct or even persuasive bearing in deciding the question at bar. The failure of the *Brisenden* case (which was not even an appellate opinion) to even discuss or to mention, or to give any intimation the Judge was even considering (and he certainly was not passing on) the effect of Sec. 3 (28 U. S. C. A. 125) raises serious doubt as to it having been called to the attention of the Judge, or it being considered as having any possible connection with the case and question. Questions merely lurking in the record, (but not brought to the Court's attention or mentioned or discussed) do not create precedents (*Webster* v. *Fall*, 266 U. S. 507 and cases cited p. 513; *K. V. O. S.* v. *Associated Press*, 299 U. S. 269, 279-80) and as a non-appellate Court decision, it does not come within the doctrine of *stare decisis* merely because Judge Simonton was a Fourth Circuit Judge. Black's Law of Judicial Precedents, Sec. 102, p. 329, 331-2, and Federal cases cited.

Davies v. *Lathrop*, 12 Fed. 353 (C. C. A. 1882) was decided before the passage of the Acts of 1887-8. It correctly stated what was undoubtedly the law at that time. But the law itself changed in 1887-8 by the enactment of 28 U. S. C. A. 125.

Pope v. *R. R.*, 173 U. S. 573, 575 merely holds Pope's attempted appeal from lower Court judgment which passed on his right of removal for diversity of citizenship was abortive. *Pepper* v. *Rogers*, (1904) 128 Fed. 987; *Porter* v. *Davies*, (1915) 223 Fed. 456; and *Bank* v. *Casualty Co.*, 70 Fed. 420 (1895) did not involve rights of *Federal* receivers to remove for diversity; nor does *Cent. Trust Co.* v. *E. Tenn. Ry. Co.* (1894), 59 Fed. 523, or *Tompkins* v. *McLeod*, (1899) 96 Fed. 92, or *Gilmore* v. *Herrick*, 93 Fed. 525 involve rights of removals *for diversity of citizenship*, all these removals being on other grounds not now recognized by this

or any other Federal Court. The writers of these opinions were openly hostile in some instances to 28 U. S. C. A. 125 being allowed any effect, except to relieve plaintiff's suing without leave of appointing Court from prosecution for contempt.

Brisenden v. *Chamberlain*, 53 Fed. 307 (C. C. 4th Cir., 1892), was decided before *Gableman* v. *Peoria, etc. Ry.*, 179 U. S. 335 (decided December 10, 1900). Appellant respectfully suggests that not only was the *Brisenden* case inferentially overruled by the *Gableman* case, but that it is quite worthy of notice that this case, though discussing fully old Secs. 1 and 2 of the removal acts, makes no mention whatever and enters upon no construction or discussion and makes no attempted interpretation of the new Section 3, or of new Section 2, and apparently overlooked these, entirely as factors, or such were not called to the Judge's attention; and he does not discuss or pass on either in any way.

It seems certain that this *Brisenden* case was one of the Circuit Court cases of which Simkins Fed. Prac. (3rd Ed.), Sec. 1117, said in regard to Sec. 3, in discussing the effect of the *Gableman* case:

> "The Court, construing the Act cited in Footnote 1 (28 U. S. C. A. 125) says: 'This Act gave the citizen the right to determine in his local Court by verdict of a jury, the amount and justness of his cause of action', and the manifest object rejects the construction of many of the circuit courts that the Act of 1888 did not change the law further than to relieve one from contempt for suing the receiver in the State Court."

Also to same effect, see Sections 123, 124, 136 and 394 of Simkins Federal Practice.

Matarazzo v. *Hustis* (1919), 256 Fed. 882 (opinion by Ray, District Judge, not an appellate, but only a District Court opinion) undoubtedly contains the language quoted in the Circuit Court opinion, which might be of persuasive

force if the matter there adverted to was in the slightest way embraced in the actual decision of the *Matarazzo* case. But it was not. The statement was not even *obiter* in that case, it was merely a side remark, apropos of nothing. It was written by a District Judge, having no binding powers of general construction had Section 3 (28 U. S. C. A. 125) been involved. It was not even mentioned; it was inapplicable to the proposition as dealt with; it did not even "lurk in the record", and was presumably not even considered. The portion quoted is a mere postulate, assumed as a basis for argument or statement. That case only involved the right of an alien against a Receiver, and the only questions considered or decided was as to the rights growing out of the alienage, and as to what District Court the removal must be made, and whether a Federal Receiver was a *Federal officer.* Its only pertinent attempted holding as to removability was that a Federal Receiver *was a Federal officer,* and had a right under Section 33 of Judicial Code to removal on that ground. It is one of the cases referred to in granting the certiorari and as affording the conflict calling for settlement by the United States Supreme Court, and was overruled in this respect by *Gay* v. *Ruff,* 292 U. S. 25. See note 2, page 28. Until it was there overruled and its force as a precedent on the only right of removal actually passed on, and was thereby utterly destroyed as a precedent on removal, it was frequently referred to as a "leading case" establishing the doctrine that under Section 33 Judicial Code (28 U. S. C. A. 76) Federal receivers were Federal officers; and that such receivers were entitled to remove cases as such as a matter of right. Hamilton on Removal of Causes, Sec. 136, note 11-b; Sec. 140-a, notes 30-d and e.

The distinguished Judge who wrote the opinion in *Matarazzo* v. *Hustis, supra,* was just as badly mistaken, petitioner most respectfully suggests, in the off-hand state-

ment contained in his postulate, as he was in the final result reached, on the only matter he was attempting to judicially decide—that Federal receivers were Federal officers and as such entitled to exercise the right of removal—as to which he was expressly overruled by this Court, by citing the case in the note of contrary holdings upon which *certiorari* was granted in *Gay* v. *Ruff*, 292 U. S. 25, 28; and the contrary judgment to that in the *Matarazzo* and other like cases, affirmed.

If petitioner's contention as to the law of the question actually presented by this petition is wrong, why it is wrong, and she should and will lose, and so mote it be. But such a result should not, and cannot justly be reached by any proper application of, or under or according to applicable law and procedure of the made citation of the Circuit Court below of *Matarazzo* v. *Hustis, supra,* as an authority for something it did not and never attempted to decide, and by the quotation by the Circuit Court below of the incorrect postulate which the opinion in *Matarazzo* v. *Hustis, supra,* attempted to be laid down as one of the bases for the erroneous decision attempted to be actually reached—that Federal receivers were Federal officers, and entitled to remove cases for negligent torts of their servants in the operation of a public utility—as to which actual decision *Matarazzo* v. *Hustis* has been overruled by this Court as an authority.

Berens v. *Byram* (D. C. S. D. 1927), 26 Fed. (2d) 953, was not an appellate decision; and like the *Matarazzo* case dealt only with the right of Federal receivers to remove cases as United States officers, and did not purport to deal with their citizenship and has been overruled. It erroneously held that they were such officers; and is one of the cases referred to as affording the conflict on which *certiorari* was granted in *Gay* v. *Ruff*, 292 U. S. 25 (Note 2, p. 28).

Smith v. *Rockliffe,* 87 Fed. 964 (C. C. A., 9th Cir. 1898), decided before the *Gableman* case, *supra,* turned solely upon the fact that the State of California was a party to it.

Petitioner thinks none of the foregoing or the following cases are the least in point, but all must be noticed. Some, or most, are cited in the *Gableman* case, or in opinions of the courts below—some are referred to in those there cited, or such are said to rest on them. All are interlocked with the foregoing ones which are cited in the Circuit Court opinion, and have been strenuously relied on by the respondents, in the courts below:

Barton v. *Barbour,* 104 U. S. 126, 129 (1881) antedates the legislation now before the court. *Texas Pac. Ry.* v. *Cox,* 145 U. S. 593, 602, was a case which involved a receivership of a *Federal corporation,* and also antedates the *Gableman* case, and has been expressly modified by and harmonized with it (p. 342), as was *Tennessee* v. *Union Planters' Bank,* 152 U. S. 454, and *Hornsby* v. *Rouse,* 161 U. S. 588.

The foregoing numerous Circuit Court cases, and *Brisenden* v. *Chamberlain, supra,* clearly are some of the Circuit Court cases referred to in Simkins Red. Prac. (3d Ed.) Sec. 1117 as having been rendered innocuous by the *Gableman* case.

Neither *Gaines, Admr.* v. *New Orleans,* 138 U. S. 595, or *Mexican Cent. Ry. Co.* v. *Eckman,* 187 U. S. 420, nor *Biggs* v. *Bowen,* 170 N. C. 34 or *Amory* v. *Amory,* 95 U. S. 186, 187 (the last decided before 1887) nor do the North Carolina cases cited even remotely involve Federal receiverships, or deal with Federal receiverships or removals from State courts in any way. Neither *Sellars* v. *R. R.,* 205 N. C. 149, nor McIntosh N. C. Prac. & Proc. in the cited section, deals with Federal receiverships, or as to removals in any way. Only leave of court to sue is dealt with in the *Sellars* case, in which the North Carolina Supreme Court (overlooking

McNulta v. *Lochridge,* 141 U. S. 327 and other U. S. Supreme Court cases directly to the contrary) dismissed that case. It is not in point.

No other discovered case since the *Gableman* case (other than the case at bar) has challenged the correctness of petitioner's contended interpretation of its purport. Plaintiff fails to find, as was by the District Judge stated, perhaps inadvertently, and probably not intending it to be taken as a statement of independent fact, as is contained in his opinion of Nov. 24, 1942 (R. 4), that "it seems strange that this question has not been presented to an Appellate Court since the Gableman case," but,

> "* * * innumerable suits against Federal receivers have been removed to the Federal Courts on diversity of citizenship, and so far as this Court has been able to find, the right to do so has not been challenged until this case," * * *

Petitioner concedes the question has not been presented, and that the printed Federal reports not only fail to show such a challenge, but she also most respectfully but confidently submits His Honor would neither have found in the Federal Supplement, or Federal Decisions, or Federal Reports, nor in any reported Federal case or set of Reports, or any published Federal case, one in which such right of removal based on a diversity of citizenship had been even *attempted to be asserted* by a *Federal* receiver since 1888, nor one in which it had been *allowed* or *granted* by any Court on such ground. From this petitioner draws quite a different and a directly contrary conclusion from that reached by the District Judge.

Petitioner thinks she may with confidence not only admit, but assert as a fact, what is not other than conceded or admitted by the Courts below throughout—as above in District Court opinion; and trenchantly described in the Cir-

cuit Court opinion as "a rather remarkable lack of judicial authority"; and conceded the Supreme Court of North Carolina opinion, (222 N. C. 133), by stating (p. 137) that the "diligence of counsel and our own research have failed to find such a decision." Petitioner therefore states there is no reported decision of such a case since 1888.

She likewise has good reason to believe she could conclusively establish to any fact-finding agency available to her for the purpose, that had the District Judge below, instead of probably relying on some vague and mistaken general impression—and the expression used does not indicate whether he means that he derived the same from the published reports, or investigation, or from some supposed personal recollection of extrinsic facts—had he searched, or caused to be searched the dockets of his District Court at its headquarters at Greensboro (the only one which was available to petitioner's counsel, but which contains the bulk of the business for that District), or that of the Eastern District of North Carolina at its main office at Raleigh, from which his district was partly formed, His Honor would have also found this case at bar to be the only cause ever therein, in which, since the establishment of his district, or since the conferring on District Courts of jurisdiction on removal cases, a *Federal* receiver *has attempted* to assert a right of removal *for a diversity of citizenship;* and that no case could be found wherein a *Federal* receiver had asserted, or sought, or has been allowed, or been granted a removal on the grounds of *diversity of citizenship;* and that such search would have also disclosed that all removals by *Federal* receivers were on some other grounds than diversity of citizenship—most of them, and usually asserted by causing the Federal District Clerk, without any action whatever by the Judge, to issue what was denominated a Certiorari to the State Court, and thus remov-

ing it—and in most instances such was at the instance of these particular respondents; and that such were made on the sole ground that *Federal receivers were Federal officers* under 28 U. S. C. A. 76, and as is now denied to all in *Gay* v. *Ruff*, 292 U. S. 25 and to them specifically in *Caddell* v. *Powell, et als.*, Receivers, S. A. L. Ry. 70 F. (2d) 123; Fourth Circuit.

Petitioner submits it would be most unreasonable to believe some plaintiff—if his case had been forcibly removed to and kept in the Federal Court by a Federal receiver against his will and over his objection on the ground of an alleged diversity of citizenship, would not have noted his exception, and would not have had such exception properly preserved, and would not have sometime and somewhere lost his case by final judgment, and would not have appealed from such final judgment to the Circuit Court of Appeals, or had it otherwise removed to such court for review, and would not have there tested the matter of such removal on such ground in such appellate court, and that such decision would be found in some reported decision. No one connected with this case has been able to find such.

Petitioner says, however, this paucity of decisions does not even inferentially raise any shadow of a fair presumption that such removals were made as of course. To petitioner the strong weight of probability establishes quite to the contrary—that it indicates a lack of attempt by *Federal* receivers to assert such rights, or it being denied the receiver, who was without right of appeal on the granting of the inevitable motion to remand.

Petitioner argues that Chief Justice Fuller's interpretation for this Court of 28 U. S. C. A. 125 in the *Gableman* case, and the decisions in other cases of like import, not only has been accepted by Congress for over 42 years, but also accepted and such construction given to it by recog-

nized and eminent text writers and authors of standard works of reference, and of encyclopedias, without substantial exception; and by the legal profession and courts at large; that appeals growing out of motions to remove by *Federal* receivers for diversity of citizenship disappeared from the Federal appellate reports about 1888, because of acquiescence of *Federal* receivers therein and an abandonment of such claim by such Federal receivers, and that such right was not after 1887 seriously asserted, or if asserted, was denied.

Such removals by Federal receivers before 1887 were authorized by existent law for a diversity of citizenship, but was denied by the 1887 Act, 28 U. S. C. A. 125, and thereafter attempted removal by Federal receivers on grounds of diversity was superseded by other asserted grounds. After 1916 it was usually attempted to be (and for years successfully) claimed under the amendments to Sec. 33 of Judicial Code in 1916, 28 U. S. C. A. 76.

Federal railroad receivers have apparently at all times since there have been such, contended, with fair success in the former Circuit Court and in the Circuit Courts of Appeal, that somehow by divine right or by an adverse user since the memory of man runneth not to the contrary, or by prescription, or in some other mysterious way comprehensible only to the initiated, they were, as a favored class apart, entitled to cause removals to be made to Federal Courts on some ground at their volition, as appurtenant to some natural sort of right with which they were by nature endowed, and without which they could not be happy, and not only conducive to their sense of power, dignity and importance, but also extremely useful and efficacious as a weapon for clubbing the humble and unwashed citizenry into abject submission; and that some way for its preservation and unlimited and unbridled exercise must be discov-

ered and preserved to them,—as formerly asserted as arising under the Constitution and laws of the United States because appointed under Federal law; or under Judicial Code 33 as "Federal officers"; or as now claimed for a diversity of citizenship—a veritable Lazarus newly raised from the dead, bound hand and foot with grave clothes and its face bound about with a napkin.

The law at all times since March 3, 1887, has been to the direct contrary. *Gay* v. *Ruff,* 292 U. S. 25 effectually punctured the "Federal officer" complex which was developed under 28 U. S. C. A. 76 to the extent such receivers bypassed Federal Judges and purported to obtain Writs of Certiorari from the Federal Clerks, and with them yanked cases out of the State courts with the same disregard for the feelings of the victim as is displayed by a side-show dentist in removing a tooth. This was for many years locally, at least, the favorite and favored contention and procedure of Federal receivers.

For all of the foregoing reasons, and because of the gravity and importance of the questions of Federal law involved affecting the general rights of the citizen and the jurisdiction of Federal Courts, and the manifest misapprehension as to the true import of the cases relied on to support the reasoning in the opinions of the courts below; and citation and reliance on cases, some of which have been overruled and which are in conflict with the decisions of this Court, as is hereinbefore set out, the supervisory powers of this Court should be exercised to grant to the petitioner the Writ; and on the merits this Court should correct the decisions below and harmonize them with the law and the decisions of this Court.

* * * * * * *

While not determinative on this petition, it is to be noted that no right existed to removal by Seaboard Air Line

Railway Company as a Corporation, for diversity of citizenship, as it is and was a North Carolina Corporation. Pr. Laws 1899, Ch. 68 and Pr. Laws 1901. Ch. 168 enacted by the North Carolina legislature authorized the consolidation of certain railway companies, some of them North Carolina corporations, to form Seaboard Air Line Railway Company. *Cox* v. *R. R.*, 166 N. C. 652; *Staton* v. *R. R.*, 144 N. C. 135.

* * * * * * *

Conclusion.

F—The Judgment of the Circuit Court of Appeals Should Be Reversed; and that Court Should Be Directed to Remand this Case to the District Court, with Directions to Remand to the Superior Court of Lee County, North Carolina, Whence it Came.

For all the foregoing reasons, this petition for a Writ of Certiorari should be allowed as presenting a question of gravity and importance, and of important Federal law and Federal Court jurisdiction, which if heretofore settled has been rendered uncertain and unsettled by the Circuit Court opinion; and calling for an exercise of the supervisory powers of this Court.

Upon a hearing on the merits involved in this petition, if the same be directed, the judgment of the Circuit Court of Appeals for the Fourth Judicial Circuit affirming the judgment of the District Court dismissing this action for lack of prosecution should be reversed; and the orders of the District Court refusing to remand this case should be ordered reversed, and the case should be directed to be remanded to the State court.

Should petitioner's argument be deemed longer and more diffuse than is ordinarily required or allowed, she asks that Your Honors bear with her counsel, in tender consider-

ation of the magnitude and importance to her and to the public at large and to the courts of the question presented; and the necessity for a definite settlement of the question of Federal jurisdiction, and of the great desirability to all that a definite declaration be made of the law as to this important right of the citizen, and of the jurisdiction of Federal Courts, which will be so plain that he who runs may read. Her many prior attempts to preserve what she thinks are her plain rights under the written law have been favorably acted on at only one of the five prior hearings—that before the State Court Clerk—and she respectfully submits that though a presumption still exists that the District Court below was without jurisdiction, and that her plea should not be rejected until every test hereinbefore suggested be applied as a touchstone, petitioner's counsel realizes that practically, if not technically, petitioner has much to overcome, and respectfully submits he should be allowed some degree of both latitude and longitude to meet and controvert not only the basic errors appearing in the two opinions delivered by the courts below, over which this Court exercises a supervisory jurisdiction, but also those in the opinion of the State Supreme Court, which each of the courts below has expressly adopted and made its own.

However erroneous these may be, when counsel attempts to challenge these positive pronouncements by these eminent jurists, who have incorrectly decided this case in the courts below, he may well liken his plight to that of Issachar. Gen. 49:14.

Respectfully submitted,

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